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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 232

MILTON KOBLITZ,

*Petitioner,*

*—against—*

THE BALTIMORE AND OHIO RAILROAD COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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### Opinions Below

The opinion of the district court (R. 10(a)) is reported at 164 F. Supp. 367. The *per curiam* opinion of the court of appeals (R. 49a; Pet. 16) is reported at 266 F. 2d 320.

### Jurisdiction

The judgment of the court of appeals (R. 50a; Pet. 44) was entered April 28, 1959. The petition for certiorari was filed July 15, 1959. Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1).

## Question Presented

Whether under the law of the State of New York the claim of petitioner against respondent is barred by the doctrine of res judicata.

## Statement

On May 7, 1952, one Rieser and others, together with petitioner (Koblitz), invoking diversity jurisdiction, filed a complaint against respondent (B&O) in the United States District Court for the Southern District of New York (R. 25a). That complaint (*Rieser* complaint) alleged ownership by plaintiffs of an aggregate of $210,000 principal amount of Chicago and Alton Railroad Company 3% Refunding Mortgage Bonds (Alton Bonds) and purported to state a representative or class action on behalf of all other holders of such bonds (R. 29a-30a). The *Rieser* complaint also alleged that:

(a) B&O owned all of the common stock of, and exercised control over, the Chicago and Alton Railroad Company (Alton) from January 7, 1931, to November 25, 1942, when the United States District Court for the Northern District of Illinois (reorganization court) took custody of Alton under Section 77 of the Bankruptcy Act [47 Stat. 1474 (1933), as amended, 11 U. S. C. § 205 (1952)] (R. 30a, 35a);

(b) "In violation of its fiduciary duties", B&O, by various actions taken in the period 1931-1942, "caused loss, damage and injury to Alton, to the holders of Alton Bonds and to the property and assets covered by the lien of the mortgage securing the Alton Bonds" (R. 31a-34a);

(c) On April 1, 1941, Alton defaulted in the payment of the interest due on its bonds and, on November 25, 1942, petitioned the reorganization court under Section 77 of the Bankruptcy Act (R. 34a-35a);

(d) During that reorganization proceeding, the reorganization court was requested, on behalf of Alton bondholders, to direct the Section 77 trustee to prosecute a claim against B&O based upon the acts hereinabove alleged, but such request was denied (R. 36a-37a);

(e) The reorganization court allowed the claim of the Alton mortgage trustee on behalf of the owners and holders of Alton Bonds for the full principal amount of the Alton Bonds ($45,350,000) (R. 36a) but confirmed by final order entered May 31, 1947, a plan of reorganization which (i) sold the Alton properties free and clear of the mortgage to the Gulf, Mobile and Ohio Railroad Company, (ii) dissolved the Alton, (iii) discharged all claims of the bondholders against the Alton and the mortgaged properties by the payment of new Gulf, Mobile and Ohio Railroad Company securities having a fair and reasonable value of only $375 for each $1,000 principal amount of Alton Bonds, and (iv) reserved the rights of the Alton bondholders with respect to their claims, "if any", against B&O (R. 36a-38a); and

(f) Plaintiffs "are in the position of creditors who have secured judgments establishing their claims and have issued executions which have been satisfied to the extent of 37½ cents in respect of each dollar of principal amount and otherwise returned unsatisfied" (R. 38a).

Under the heading "FOR A FIRST CAUSE OF ACTION", the *Rieser* complaint claimed on behalf of Alton bond-

holders against B&O on a legal theory of derivative right that ran: (a) Alton has a tort claim against B&O; (b) Alton bondholders are in the position of "unsatisfied judgment creditors" of Alton; and, hence, (c) Alton Bondholders may claim against B&O in the right of Alton (R. 28a-39a).

Under the heading "FOR A SECOND CAUSE OF ACTION", the *Rieser* complaint claimed on behalf of Alton bondholders against B&O on a legal theory of independent right that ran: (a) the "acts and transactions" of B&O which constituted a tort against Alton also constituted a direct tort (fraud) against Alton bondholders; and, hence, (b) Alton bondholders may claim against B&O in their own right (R. 39a).

On April 27, 1954, B&O moved the district court for summary judgment on the ground that the *Rieser* complaint and all claims alleged therein were barred by New York statutes of limitations. In an opinion deciding that motion (Pet. 18), the district court described the *Rieser* complaint as asserting a claim under two legal theories, (i) a theory of derivative right against B&O, *i.e.*, an action by bondholders in their "capacity [as] creditors in aid of execution" of their debtor's claim against B&O (Pet. 20), and (ii) a theory of direct right against B&O for "fraud . . . upon the Alton bondholders" (Pet. 23). With respect to those theories, the district court concluded that under the law of New York the factual allegations of the *Rieser* complaint were an assertion by plaintiffs "not of a claim of their own, but one which is an asset of their debtor Alton" (Pet. 32).

On March 7, 1955, a partial summary judgment in favor of B&O was entered in the district court, adjudging that New York Civil Practice Act, Section 53, (a ten-year statute of limitations) barred all claims set forth in the *Rieser* complaint except those which might have arisen in the six-month period between May 7, 1942 (the date ten

years prior to the filing of the *Rieser* complaint) and November 25, 1942 (the date on which the reorganization court took custody of Alton) (R. 41a-42a; Pet. 18).

An appeal from that judgment was taken to the United States Court of Appeals for the Second Circuit. In an opinion reported at 228 F. 2d 563, that court affirmed, holding:

> "... plaintiffs contend that they suffered a direct and independent injury, apart from that done to Alton, and that a cause of action based on such injury accrued only after they had obtained a judgment with execution thereon returned unsatisfied. .... The crucial question here is whether the alleged acts of B & O (a) constitute harms to Alton, and but indirectly to plaintiffs, Alton's bondholders, and/or (b) constitute harms done directly to those bondholders. Absent a statute, we think they clearly came within the first category.
>
> "Alton, for these harms, could have held B & O liable; and so could Alton's bankruptcy trustee, as Alton's successor. Like the trustee, the plaintiffs stand in Alton's shoes; they have no shoes of their own. Significantly, plaintiffs cite no case holding otherwise, absent a statute.
>
> "...
>
> "... [T]he pertinent period of limitations is either (a) three years, under the New York Civil Practice Act, Section 49, subdivision 7, ... or (b) six years, under Section 48, subdivisions 1 or 8.
>
> "In short, making assumptions most generous to plaintiffs, suit on the claims against B & O were barred on November 25, 1948, *i.e.*, six years from the appointment of Alton's bankruptcy trustee on November 25, 1942." (228 F. 2d at 564-65; Pet. 40-42.)

On April 2, 1956, this Court denied certiorari. *Rieser, et al.* v. *Baltimore & Ohio Railroad Co.*, 350 U. S. 1006.

Since the statutory grounds (New York Civil Practice Act, Sections 48 and 49) upon which the court of appeals

had based its affirmance of partial summary judgment for B&O necessarily precluded any claim under the *Rieser* complaint for the period May 7, 1942 to November 25, 1942, upon remand, B&O moved for summary judgment dismissing the complaint and action in toto. The district court granted that motion. (R. 44a-46a).*

**The Instant Action**

On February 15, 1957, Koblitz instituted the instant action in the Supreme Court of the State of New York, County of New York (R. 23a). On March 7, 1957, invoking the diversity jurisdiction of the federal court, B&O caused the suit to be removed to the United States District Court for the Southern District of New York (R. 1a, 23a-24a). The complaint of Koblitz (*Koblitz* complaint) alleges ownership by him of $50,000 principal amount of Alton Bonds and purports to state a class or representative action on behalf of all other Alton bondholders. Its factual allegations were conceded below, and are conceded here (Pet. 5, 8), to be substantially identical with those of the *Rieser* complaint.** The single difference between the two complaints is that the *Koblitz* complaint alleges that B&O performed its tortious acts (frauds) in concert and conspiracy with Alton, whereas the *Rieser* complaint did not thus charge Alton (Pet. 9).

B&O moved for summary judgment in the instant action on the ground that the claim asserted in the *Koblitz* com-

*Although petitioner also appealed from that judgment to the court below, upon failure to prosecute the appeal, as required by Rule 14(c) of the court, B&O applied to dismiss it. That application was granted April 16, 1957 (R. 47a). Petitioner moved the court to reinstate the appeal but the motion was denied May 8, 1957. A petition for rehearing was denied June 4, 1957.

**For convenience, there is appended to this brief a TABLE OF COMPARISON which sets forth in parallel columns all of the allegations of the instant complaint and the virtually identical allegations of the *Rieser* complaint.

plaint is res judicata and, in any event, barred by applicable statutes of limitations (R. 21a-22a). On July 11, 1958, the district court granted the B&O motion on the res judicata ground (R. 10a) and thereupon final judgment was entered dismissing the *Koblitz* complaint (R. 20a).

On April 28, 1959, following timely appeal, the court below affirmed on the opinion of the district court, declaring:

> ". . . In addition to the estoppel of the former judgment we find that the basic point now argued as to whether the source of appellant's claim is derivative or direct, was determined in the appeal to this Court from the adverse judgment in the prior action. *Riesel* v. *Baltimore & Ohio R. R.*, 2 Cir., 1955, 228 F. 2d 563. Thus appellant is bound not only by a direct but also by a collateral estoppel." (Pet. 16)

## ARGUMENT

Koblitz urges a grant of certiorari by this Court, contending that the decision below is in conflict with that in *Southern Pacific Company* v. *Bogert*, 250 U. S. 483 (Pet. 11-14). There is no conflict. The decision below clearly accords with the applicable law of the State of New York.

### A. *Southern Pacific Company* v. *Bogert*, 250 U. S. 483.

In *Bogert*, plaintiffs were minority stockholders in a corporation the assets of which had been sold to the majority stockholder at a foreclosure sale in an equity receivership reorganization. The assets had been sold at a price which did not permit a distribution to plaintiffs except upon payment of an allegedly excessive assessment. For years plaintiffs made collateral attacks upon the foreclosure sale but were unsuccessful in having it set aside. Their complaint in *Bogert*, however, unlike their complaints in the prior actions, pleaded the fact of acceptance and ratification

of the foreclosure sale and sought recovery only for the refusal of the majority stockholder to accord the minority participation on a fair pro rata basis in the equity of the reorganized company.

*Bogert*, then, involved new operative facts and, therefore, a claim different from those adjudicated earlier between the parties. But here, the two claims remain identical in all essential respects. Koblitz in both actions has relied upon the same alleged acts of B&O, all purportedly occurring prior to the Alton reorganization decree (May 31, 1947). In each case Koblitz has sued to recover the same debt (the bonded indebtedness) out of the assets which B&O is alleged wrongfully to have withheld or received prior to 1942 from the Alton. Therefore, in so far as res judicata is concerned, the *Bogert* decision has no bearing on the instant case.

**B. The Decision Below Is Correct.**

Federal jurisdiction over this action is grounded upon diversity of citizenship, the applicable law being that of the State of New York. Under that law, a judgment on the merits creates an absolute bar to a subsequent action on the same cause of action between the same parties. *New York State Labor Relations Board* v. *Holland Laundry, Inc.*, 294 N. Y. 480, 493, 494 (1945); *Miller* v. *National City Bank of New York*, 166 F. 2d 723, 726 (2d Cir. 1948).* Koblitz concedes that the *Riesey* complaint, and

*Although Koblitz asserts that the judgment dismissing the *Riesey* complaint and action was not "adjudication of the merits" of that case (Pet. 10-11), he concedes that a valid and final personal judgment, based on the bar of New York statutes of limitations, was rendered there in favor of B&O and against him (Pet. 3-4, 10-11). The law is clear that for purposes of applying the doctrine of res judicata such a judgment is a judgment on the merits. *Miller* v. *National City Bank of New York*, 116 F. 2d 723 (2d Cir. 1948); *Accord, Angel* v. *Bullington*, 330 U. S. 183; *Restatement, Judgments* § 49, comment a.

the complaint in the instant action allege exactly the same injury to the same property by reason of the same acts by B&O (Pet. 5). Since Koblitz has not pleaded operative facts different in any way from those pleaded in the *Rieser* action, he has not pleaded a new cause of action. *Ibid.*

Nor can Koblitz contend that the instant action is not barred by the judgment in the *Rieser* action because he now pleads a legal theory of "direct" right of recovery in Alton bondholders against B&O whereas, in the prior litigation, he had pleaded only a legal theory of "derivative" right of recovery (Pet. 4-8). Variations in legal theory do not create variations in the causes of action for purposes of applying the doctrine of res judicata. See *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464 (3d Cir. 1950), *cert. denied*, 341 U. S. 921.* Furthermore, Koblitz is clearly in error in suggesting that the complaint in the *Rieser* action did not proffer the legal theory of "direct" right of recovery (Pet. 4-5). In the so-called "SECOND CAUSE OF ACTION" of the *Rieser* complaint, Koblitz claimed on behalf of Alton Bondholders on a theory of direct tort by B&O against those bondholders. Thus, the "SECOND CAUSE OF ACTION", after repeating and realleging every

*Koblitz's discussion of his new legal theory as raising a new cause of action is not only erroneous under the law of res judicata but it is extremely misleading substantively. Koblitz argues that a derivative action on behalf of a corporation does not lie where all stockholders have consented to conduct which impairs the ability of the corporation to pay its debts. For this proposition, Koblitz cites and quotes from many cases which hold only that, vis-a-vis subsequent stockholders, waste of corporate assets consented to by all stockholders at the time does not give rise to a derivative cause of action (Pet. 12). Those cases are irrelevant here. Vis-a-vis creditors, such as Alton bondholders, any waste of corporate assets, though consented to by stockholders, which impairs the ability of a corporation to pay its debts is illegal and does give rise to a derivative cause of action on the part of creditors. The court below so held in the *Rieser* appeal (228 F. 2d at 565) and further observed that in New York, absent a statute, such conduct gives rise only to a derivative cause of action on the part of creditors. That holding is amply supported by authority. See, *e.g.*, *Austrian* v. *Williams*, 198 F. 2d 697 (2d Cir. 1952).

allegation of the "FIRST CAUSE OF ACTION", further alleged that:

> "The acts and transactions complained of also constitute a fraud practiced by the defendant upon . . . the holders of Alton Bonds, including the plaintiffs." (R. 39a)

Koblitz fully intended that the legal theory of direct right of recovery alleged in the "SECOND CAUSE OF ACTION" should be in issue in the *Rieser* litigation. He made that amply clear in his briefs to the court of appeals and in his petition to this Court for a writ of certiorari. For example, in his main brief in the court of appeals in the *Rieser* action, Koblitz asserted:

> "The complaint prays (p. 13) judgment, not for the amount of any claim by Alton against the appellee, but for the deficiency due the bondholders. . . ." (Appellants' Brief, No. 23560, p. 8).

In a reply brief, he further stated:

> "Appellants insist that they are not asserting claims which belong or ever belonged to Alton. They are mounting independent and wholly different causes of action. . . ." (p. 2)

In his supplemental memorandum, submitted after argument to the court of appeals, Koblitz reiterated:

> "In brief and argument we have urged (a) that this creditors' bill asserts claims which belong, and rest upon direct injury, to the creditors represented by the plaintiffs. . . ." (p. 1)

Finally, after the adverse decision in the court of appeals (228 F. 2d 563), Koblitz in a petition to this Court for a writ of certiorari, stated:

> ". . . the legal pivot upon which this entire case turns is whether, under New York law, a plaintiff in a creditor's bill asserts a cause of action belonging

> to his principal debtor or a cause of action belonging independently to himself" (p. 7)

and, further,

> ". . . this creditors' suit is not derivative but is direct, and seeks recovery for injury to the bondholders and not to Alton" (p. 16)

and, lastly,

> ". . . [p]etitioners' action . . . is not, in any sense, 'derivative', nor is Alton petitioners' predecessor in interest'." (Reply Br. p. 1)

It is impossible to read those excerpts and not conclude, as did the court below, that:

> ". . . the basic point now argued as to whether the source of appellant's claim is derivative or direct, was determined in the appeal to this Court from the adverse judgment in the prior action." (Pet. 17)

In New York, in such circumstances, the doctrine of res judicata puts an end to the matter. *New York State Labor Relations Board* v. *Holland Laundry, Inc.*, 294 N. Y. 480, 494 (1945).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 14, 1959.